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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS VILLEGAS GOMEZ,

Defendant and Appellant.

2d Crim. No. B202501
(Super. Ct. No. A953573)
(Los Angeles County)

Carlos Villegas Gomez appeals a judgment following conviction of second degree murder, with a finding of personal use of a dangerous and deadly weapon. (Pen. Code, §§ 187, subd. (a), 189, 12022, subd. (b).)¹ We affirm.

FACTS AND PROCEDURAL HISTORY

In the afternoon of June 18, 1987, Gomez stabbed a coworker, Marcos Hurtado, as the two worked at the meat counter of a market in Los Angeles. At the time, Hurtado was assisting a customer, Sofia Pineda, by weighing a meat purchase and discussing her order. Pineda, a frequent customer of the market, heard a "terrible moan," and saw a knife protruding from Hurtado's back.

Joaquin Carranza was stocking grocery shelves near the meat counter when he heard Hurtado shout, "He got me, he got me." As Carranza walked toward the meat counter, he met Gomez. Gomez stated, "I got him, I got him," discarded his apron, and

¹ All further statutory references are to the Penal Code.

left the store quickly. The market cashier testified that Gomez was "almost" running, and that he had a "nervous[]" expression.

Employees summoned medical assistance and comforted Hurtado as he lay dying on the floor. Carranza saw the bloody 12-inch butcher knife after Gomez tossed it onto a work table.

Earlier that day, the manager of the market, Rosendo Sanchez, saw Gomez consuming alcohol. Sanchez reprimanded Gomez and ordered him to leave the market and return the next day. Gomez did not then leave the market, however.

Shortly before Hurtado was stabbed, a customer heard "a rather minor discussion, argument," "something slight" behind the meat counter. She heard a person state: "Cut it [out], asshole." A coworker described the conversation as "ha[ving] words." The market manager testified that Gomez accused Hurtado of "put[ting] the finger" on his consumption of alcohol on the job.

Gomez did not return to the market or to his residence. Police officers were unable to locate him, and later they learned that he was in Mexico. On January 6, 2006, Bakersfield police officers detained and arrested Gomez for driving under the influence of alcohol. Gomez gave the officers a false name. A fingerprint comparison revealed Gomez's identity and the existence of a warrant for his arrest in Los Angeles.

The jury convicted Gomez of second degree murder, and found that he personally used a dangerous and deadly weapon. (§§ 187, subd. (a), 189, 12022, subd. (b).) The trial court sentenced him to a prison term of 16 years, imposed fines and a security fee, and awarded him 1,471 days of presentence custody credits.

Gomez appeals and contends that the trial court erred by refusing to instruct regarding sudden quarrel or heat of passion manslaughter. (§ 192, subd. (a).)

DISCUSSION

Gomez argues that sufficient evidence of provocation warranted an instruction regarding sudden quarrel or heat of passion manslaughter. (CALCRIM No. 570.) He points out that witnesses testified to an argument with victim Hurtado that afternoon. Gomez asserts that the reprimand from the manager and the argument with

Hurtado constitute sufficient provocation to cause a reasonable person to act rashly or without due deliberation and reflection. He adds that the refusal to instruct upon this lesser-included offense denied him due process of law and is not harmless beyond a reasonable doubt. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215 [defendant has constitutional right to jury determination of every material issue presented by evidence].)

A defendant possesses a constitutional right to a jury determination of every material issue raised by the evidence. (*People v. Cole, supra*, 33 Cal.4th 1158, 1215.) Thus the trial court must instruct upon a lesser-included offense whenever a question arises whether every element of the charged offense exists. (*Ibid.*) Conversely, the court is not required to instruct upon a lesser-included offense unless substantial evidence supports the instruction. (*Ibid.*)

Voluntary manslaughter includes the unlawful killing of another without malice aforethought "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) The "heat of passion" requirement has an objective and a subjective component. (*People v. Cole, supra*, 33 Cal.4th 1158, 1215.) The defendant must subjectively kill under the heat of passion, but the circumstances giving rise to the heat of passion are viewed objectively. (*Ibid.*) Moreover, the provocation that incites the defendant to kill in the heat of passion must be caused by the victim. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id.* at pp. 583-584.)

The trial court did not err by refusing to instruct regarding voluntary manslaughter because substantial evidence does not support the instruction. The evidence establishes that Gomez and the victim had "words," and a "slight" argument earlier that afternoon. Hurtado was stabbed in the back while he was weighing meat for a customer and discussing her order. This evidence is insufficient to establish provocation such that "'passion . . . would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances.'" (*People v. Cole, supra*, 33 Cal.4th

1158, 1215.) Thus, the evidence does not satisfy the objective or "reasonable person" element of voluntary manslaughter. (*Id.* at p. 1216 [passion for revenge will not reduce murder to manslaughter].)

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

Larry Paul Fidler, Judge
Superior Court County of Los Angeles

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